858B

Nos. 05-908, 05-915

FILED

OCT 10 2006

OFFICE OF THE CLERK
SUPREME COURT

In The
Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN McDONALD,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.

On Writs Of Certiorari
To The United States Courts Of Appeals
For The Sixth Circuit And The Ninth Circuit

BRIEF OF FORMER UNITED STATES SECRETARIES OF EDUCATION AND SECRETARIES OF HEALTH, EDUCATION, AND WELFARE WHO SERVED FIVE FORMER PRESIDENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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OCTOBER 10, 2006

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BRIEF OF FORMER UNITED STATES SECRETARIES OF EDUCATION AND SECRETARIES OF HEALTH, EDUCATION, AND WELFARE WHO SERVED FIVE FORMER PRESIDENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

David Mathews, Joseph A. Califano, Jr., Shirley M. Hufstedler, Lauro Fred Cavazos, and Richard W. Riley, each of whom served as United States Secretary of Education or Secretary of Health, Education, and Welfare, respectfully submit this brief as *amici curiae* in support of respondents in these cases.[1]

INTEREST OF *AMICI CURIAE*

Amici curiae are individuals who each served as the Secretary of the United States Department of Education or its predecessor, the Department of Health, Education, and Welfare, for some period of time during the past 30 years. The Secretary of Education serves as the only "single, full-time, Federal education official directly accountable to the President, the Congress, and the people." Department of Education Organization Act, Pub. L. No. 96-88, tit. I, § 101, 93 Stat. 669 (codified at 20 U.S.C. § 3401(10)).

These former Secretaries were nominated by various Presidents from both of the major political parties. Although the former Secretaries may hold differences of opinion with respect to other educational policies, in this

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[1] Letters from petitioners and respondents indicating their consent to the filing of *amicus* briefs have been filed with the Clerk of this Court. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or its counsel, made a monetary contribution to the preparation or submission of this brief.

respect they are in complete accord: reduction of racial isolation in public schools constitutes a compelling national interest. Each Secretary while serving in office supported a national educational policy of encouraging States and localities to take steps to reduce racial isolation in public schools regardless of whether that isolation could be shown to be caused by unconstitutional race discrimination.

Amicus David Mathews was appointed by President Gerald Ford to serve as United States Secretary of Health, Education, and Welfare. He served from 1975 to 1977.

Amicus Joseph A. Califano, Jr. was appointed by President Jimmy Carter. He served as Secretary of Health, Education, and Welfare from 1977 until 1979.

Amicus Shirley M. Hufstedler was the first United States Secretary of Education. She was appointed by President Carter upon the establishment of the Department and served from 1979 until 1981.

Amicus Lauro Fred Cavazos was appointed Secretary of Education by President Ronald Reagan and was retained as Secretary by President George H.W. Bush. He served from 1988 to 1990.

Amicus Richard W. Riley was appointed by President William J. Clinton. He served as Secretary of Education from 1993 to 2001.

Amici file this brief because, in their view, petitioners and their *amici* either ignore or improperly diminish the virtually unwavering support that the national government has long provided, through the Department of Education and its predecessor, to voluntary local actions in the Nation's public schools to eliminate, reduce, and prevent racial isolation, with the understanding that consideration of race of the students would sometimes be necessary to achieve that goal.

SUMMARY OF ARGUMENT

I. Over the course of the past several decades, the United States Department of Education, as well as its predecessor the Department of Health, Education, and Welfare (together "the Department" or "Department of Education") has deliberately supported voluntary local efforts to eliminate racial isolation and to develop integrated, racially diverse schools regardless of any proof of *de jure* segregation. The Department, with its expertise and ability to examine the effects of not only *de jure* but also *de facto* segregation on a nationwide level, has properly described this interest as a compelling one, and has consistently determined that use of race in furtherance of this interest can be appropriate.

The Department's support for such voluntary local efforts manifested itself as the Department implemented various grant programs, first established by statute in 1972 and most recently re-enacted by Congress as part of the No Child Left Behind Act of 2001, that are intended to encourage the voluntary elimination, reduction, or prevention of "minority group isolation" in elementary and secondary schools. Through implementation of these programs, the Department approved plans that relied on the race of students in the determination of school assignments. Indeed, if the Department had not done so, there would have been no effective way that grant recipients could have met the detailed numerical requirements established by the statutory grant programs and the Department's regulations.

Working in tandem with Congress's efforts, the Department of Education has consistently interpreted Title VI of the Civil Rights Act of 1964 not to prohibit consideration of race in the furtherance of the elimination,

reduction, or prevention of racial isolation caused by so-called *de facto* racial segregation. The Department specifically amended its Title VI regulations in 1973 to express its longstanding view that race could be used to address racial isolation, regardless of whether the racial isolation was the result of proven intentional discrimination. These regulations are still in effect and have not been altered over the course of the past 30 years. *See* 34 C.F.R. §§ 100.3(b)(6)(ii), 100.5(i).

The federal government's longstanding policy of promoting diversity in public elementary and secondary schools reflects nearly five decades of careful and deliberate consideration of the negative effects of racial isolation. Far from embodying a fleeting administration-specific viewpoint, the Department has consistently concluded that children of all races, and society as a whole, benefit from the voluntary desegregation and diversification of segregated school districts.

II. The Department has taken a deferential approach over the past several decades to local school districts' attempts to diversify racially isolated schools. The Department has provided information, expertise, and experience to States and localities so that they can craft their own programs to address individual local circumstances. That approach reflects the longstanding policy of the federal government that public education in this country is ultimately a local responsibility. Indeed, the statute that established the Department of Education and the statutes that address methods of school desegregation all manifest the federal government's commitment to local control, a commitment that is also reflected in this Court's cases.

Some latitude must be accorded to respondents, and other local school districts, who have determined, often with the assistance of the Department's expertise, that use of race is an appropriately tailored means to achieve the compelling national interest in the elimination, reduction, or prevention of racial isolation and promotion of racially integrated schools with diverse student bodies. Granting school authorities this latitude provides them needed breathing space so that they feel confident to make sound educational choices for their students in the "play between the joints" of what the Constitution requires and what the Constitution prohibits.

ARGUMENT

The federal government's involvement in public elementary and secondary education is, for the most part, a relatively modern phenomenon. The growth of its role commenced, to a large extent, with this Court's decisions in *Brown v. Board of Education*, 347 U.S. 483 (1954), and 349 U.S. 294 (1955).

The Department of Health, Education, and Welfare (HEW) was established in 1953. *See* Act of Apr. 1, 1953, ch. 14, 67 Stat. 18 (codified at 42 U.S.C. § 3501). In 1979, its education functions were transferred to the then newly-created Department of Education. *See* Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 669 (1979) (codified as amended at 20 U.S.C. § 3401 *et seq.*). For ease of reference, albeit anachronistically, we refer in this brief to both as "the Department of Education" or "the Department."

With the enactment of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, the Department of Education became the primary federal agency responsible

for encouraging state and local governments to desegregate public schools.[2] Over the past 40 years, the Department of Education has been charged with ensuring that recipients of federal funds do not engage in unlawful race discrimination; providing technical expertise and assistance in the development of plans to desegregate, when requested by school districts; and implementing various grant programs related to race and public education.

The programs for which the Department was and is responsible all share certain features. First, as we discuss in more detail in Part II, *infra*, the Department's authority is linked to federal spending programs. The Department of Education alone does not compel school districts, through methods such as fines or court orders, to take any particular action in this area. Instead, it possesses certain authority to terminate or delay existing streams of federal financial assistance, and is authorized to grant certain additional funds for various programs related to desegregation.

The second common feature of the Department's programs, discussed immediately below, is that the Department, charged by Congress with implementing these programs, long has administered them on the understanding that they do not require school districts to disregard race in making pupil assignments in all circumstances. Just as this Court had held that race neutral policies were not sufficient to remedy *de jure* segregation, the Department understood that voluntary local efforts to eliminate effectively so-called *de facto*

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[2] The Department's earlier responsibility in this area had been limited essentially to the operation of integrated schools for the children of members of the armed forces living on military bases in the South when local schools refused to desegregate. *See* Civil Rights Act of 1960, Pub. L. No. 86-449, §§ 501-502, 74 Stat. 86.

segregation would similarly require considerations of race. The Department of Education thus gave financial support to the voluntary efforts of local school districts to reduce racial isolation in public schools even when those efforts considered a student's race in the determination of school assignment.

I. Longstanding National Education Policy Confirms That The Elimination, Reduction, And Prevention Of Racial Isolation In Public Schools Is A Compelling Governmental Interest, Including Where The Isolation Cannot Be Proven To Be The Result Of Unconstitutional Conduct

The United States Department of Education has consistently and deliberately supported voluntary local efforts to eliminate racial isolation and to develop integrated, diverse public schools, including in the absence of proof of *de jure* segregation. The Department, with its expertise and ability to examine the effects of both *de jure* and *de facto* segregation on a nationwide level, has properly described this interest as a compelling one. The Department has consistently determined that use of race in furtherance of this interest can be appropriate.[3] Petitioners' contention that these efforts do not constitute a compelling governmental interest conflicts with these determinations, rooted in the institutional learning and considered judgment of the agency charged by Congress with furthering national education policy.

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[3] *Amici curiae* do not here contest that public schools that use race in student school assignments must demonstrate that such policies further a compelling state interest.

A. After Careful And Deliberate Examination Of The Benefits Of Desegregated Schools, And Consistent With Congressional And Presidential Pronouncements, The Department Of Education Has Supported Efforts By Local School Districts To Eliminate, Reduce, And Prevent Racial Isolation In Public Schools, Including By Race-Based Mechanisms

For half a century, the federal government has sought to address the problem of racially segregated public schools in this country and their adverse effect upon our Nation's well being. To address this problem, the federal government, through the Department of Education, has concluded that local school districts should be supported in their voluntary efforts to minimize racial isolation and to promote diversity in our elementary and secondary schools. The Department reached this conclusion based in part upon its unique position to examine, over the course of many years and numerous studies, the negative effects of racial isolation on students in localities across the Nation.

1. As the country exited the era of "massive resistance" to public school desegregation, the Department's implementation of Title IV and VI of the Civil Rights Act of 1964, supported by the decisions of federal judges, significantly furthered the elimination of *de jure* school segregation in much of the South by the late 1960's.[4] Thereafter, the focus of the federal government's

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[4] Title IV of the Civil Rights Act authorizes the Department "to make grants" to school districts to pay for the costs of "giving to teachers and other school personnel inservice training in dealing with problems incident to desegregation" and "employing specialists to

(Continued on following page)

attention expanded to the problem of so-called *de facto* segregated school districts, for which sufficient proof of official race discrimination was not available. This reflected a widely-held concern that a large number of children nationwide remained racially isolated in their daily lives.

Congress, as part of the Civil Rights Act of 1964, instructed the Department to prepare a survey and report "concerning the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions." Pub. L. No. 88-352, tit. IV, § 402, 78 Stat. 247. The Department thus commissioned a team of social scientists led by sociologist James Coleman to undertake that task, which resulted in the 1966 report, *Equality of Educational Opportunity* (1966). The report concluded that the "great majority of American children attend schools that are largely segregated," but that black students in desegregated schools had higher achievement levels than black students in predominantly black schools. *Id.* at 3, 29.

The U.S. Commission on Civil Rights relied on the Department's report when the Commission conducted its own study, at the request of President Lyndon Johnson, on

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advise in problems incident to desegregation." Pub. L. No. 88-352, tit. IV, § 405, 78 Stat. 247 (codified at 42 U.S.C. § 2000c-4). That title also authorizes the Department to "render technical assistance" to local school districts "in the preparation, adoption, and implementation of plans for the desegregation of public schools." *Id.* § 403, 78 Stat. 247 (codified at 42 U.S.C. § 2000c-2). Title VI of the Civil Rights Act, as discussed later in the text, prohibits the Department from providing federal financial assistance to any entities that discriminate on the basis of race. *Id.*, tit. VI, §§ 601, 602, 78 Stat. 252 (codified at 42 U.S.C. §§ 2000d, 2000d-1).

the effects of racial isolation in the Nation's public schools. *See* 1 U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools*, at v (1967). The Commission concluded that even in those portions of the country that had not formally engaged in racial segregation, many children were being taught in single-race schools and those children were injured by their inability to interact on a daily basis with children of other races. *See id.* at 8-10, 113-114. The Commission emphasized that the Department had reached the same conclusion that "racial imbalance contributes to educational deprivation" and that the Department encouraged "efforts to develop project activities which will tend to reduce such imbalance." *Id.* at 238. The Commission recommended that the federal government provide assistance to school districts to eliminate racial isolation and foster diversity. *See id.* at 210-211.

President Richard M. Nixon subsequently explained in his 1970 statement regarding the desegregation of elementary and secondary public schools, that "*[d]e facto* segregation, which exists in many areas both North and South, is undesirable" and that "local school officials may, if they so choose, take steps beyond the constitutional minimums to diminish racial separation." 1970 Pub. Papers 304, 310 (March 24, 1970). At the President's direction, the Department drafted a bill calling for aid to school districts "that wish to undertake voluntary efforts to eliminate, reduce, or prevent *de facto* racial isolation." 1970 Pub. Papers 448, 448 (May 21, 1970).

President Nixon explained that "[i]t is in the national interest that where such isolation exists, even though it is not of a kind that violates the law, we should do our best to assist local school districts attempting to overcome its effects." *Id.* at 449. This elimination of "racial separation,

whether deliberate or not," the President concluded, was "vital to quality education – not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broadbased human understanding that increasingly is essential in today's world." *Id.*

In response, Congress enacted the Emergency School Aid Act of 1972, Pub. L. No. 92-318, tit. VII, 86 Stat. 421, to "encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students." *Id.* § 702, 86 Stat. 421. The term "minority group isolated school" was defined to mean a school "in which minority group children constitute more than 50 per centum of the enrollment of a school" and the term "integrated school" was defined as a school in which "the proportion of minority group children" was less than half of "the proportion of minority group children enrolled in all schools" in the relevant area. *Id.* § 720(6), (10), 86 Stat. 440-441. Congress continued to amend and expand the program throughout the 1970s and, after a short hiatus, the 1980s.

2. The Department of Education was charged with promulgating regulations to implement the Emergency School Aid Act's grant program and successive legislation. The Department engaged in notice-and-comment rulemaking and then issued regulations that addressed racial composition in those schools that participated in the federal grant programs. *See, e.g.*, 38 Fed. Reg. 10,094 (1973) ("In no event shall the minority group enrollment in any such school [receiving federal funds under this program] exceed 50 per centum."); 43 Fed. Reg. 36,229 (1978) (prohibiting compulsory enrollment in magnet

schools but conditioning eligibility for federal funds under the program on schools meeting "enrollment requirements relating to the percentage of minority group students and the ratio of students from each minority group").

The question of how school districts were expected to overcome "minority group isolation" was not explicitly addressed by Congress in the statute, but the Department, implementing the grant program, approved plans under these programs that relied on the race of students in the determination of school assignments. Indeed, if the Department had not done so, there would have been no way the fund recipients could have met the detailed numerical requirements established by the statutory grant program and regulations.

Congress recognized as much when it re-enacted the program in 1984. At that time, Congress, working with President Ronald Reagan, instructed that, in order for a school district to be eligible for grant funds, it must assure the Secretary of Education that "it will not engage in discrimination based upon race, religion, color, or national origin in the mandatory assignment of students to schools or to courses of instruction within the schools of such agency *except to carry out the approved plan*." Pub. L. No. 98-377, tit. VII, § 707(b)(4), 98 Stat. 1300 (1984) (emphasis added). Congress re-enacted that provision in 1988, *see* Pub. L. No. 100-297, § 3007, 102 Stat 232, and then again in 1994, *see* Pub. L. No. 103-382, § 5106, 108 Stat. 3692. That language confirms that Congress expected that consideration of race, which might otherwise constitute "discrimination based on race," would be a permissible component of a school district's plan, approved by the Department of Education, to eliminate, reduce, or prevent racial isolation.

In 1998, the Department of Education expressly described its criteria for approval of federal grants for voluntary plans that "take race into account in assigning students to magnet schools." 63 Fed. Reg. 8022 (1998). The Department explained that in order for "a voluntary plan involving a racial classification" to be "adequate," the plain "must be narrowly tailored." *Ibid.* The Department reiterated these criteria for narrow tailoring in 1999 and 2000. *See* 64 Fed. Reg. 2110-2111 (1999); 65 Fed. Reg. 46,699 (2000). Further, consistent with an intervening congressional finding,[5] the Department concluded that "reducing, eliminating or preventing minority group isolation" is a "compelling interest." 63 Fed. Reg. at 8022 (1998).

Most recently, Congress re-enacted the 1984 statutory language in 2001 as part of the No Child Left Behind Act of 2001, Pub. L. 107-110, tit. V, § 5301, 115 Stat. 1807, and it is currently codified at 20 U.S.C. § 7231d(b)(2)(C)(ii). Subsequently, the Department made clear that "if a district proposes to use race in its voluntary plan," it must demonstrate that the use is "narrowly tailored to accomplish the objective of reducing, eliminating, or preventing minority group isolation." 69 Fed. Reg. 4992 (2004).

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[5] Congress, in its 1994 amendments to the grant program, had found that it is in "the best interest of the Federal Government" to support "school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education." Pub. L. No. 103-382, § 5101, 108 Stat. 3690 (1994). That finding was reaffirmed by Congress in the No Child Left Behind Act of 2001. Pub. L. 107-110, tit. V, § 5301, 115 Stat. 1806 (codified at 20 U.S.C. § 7231(a)(4)(A)).

B. The Department Of Education Has Long Implemented Title VI Of The Civil Rights Act To Further The Ability Of School Districts To Eliminate, Reduce, And Prevent Racial Isolation, Including By Race-Based Mechanisms

For decades the Department of Education has deliberately abstained from prohibiting race-based local responses to so-called *de facto* racial segregation. Working in tandem with Congress's efforts discussed above, the Department of Education has consistently interpreted Title VI of the Civil Rights Act of 1964 not to prohibit consideration of race in furtherance of the elimination, reduction, or prevention of racial isolation.

Title VI prohibits any program or activity receiving federal financial assistance from discriminating on the basis of race. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, § 601, 78 Stat. 252 (codified at 42 U.S.C. § 2000d). It charges the Department of Education with the responsibility to enforce the prohibition for the assistance it disburses through rules of general applicability approved by the President. *See id.* § 602, 78 Stat. 252 (codified at 42 U.S.C. § 2000d-1).

The early years of the Department of Education's efforts to enforce Title VI focused virtually exclusively on the elimination of the dual school system in the South. When the Department first began to focus on school segregation outside the South, it promulgated Title VI Guidelines that provided that neither its regulations "nor Title VI bars a school system from reducing or eliminating racial imbalance in its schools" regardless of its cause. *Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964*, 33 Fed. Reg.

4955 (1968); *see also* Pub. L. No. 90-557, § 410, 82 Stat. 995 (1968) (instructing the Department to "enforce compliance with title VI of the Civil Rights Act of 1964 by like methods and with equal emphasis in all States of the Union" and to "assign as many persons to the investigation and compliance activities * * * in the other States as are assigned to the seventeen Southern and border States to assure that this law is administered and enforced on a national basis").[6]

After notice-and-comment rulemaking, the Department amended its Title VI regulations in 1973 to confirm specifically its longstanding view that race could be used to address racial isolation, regardless of whether the racial isolation was the result of proven intentional discrimination. The Department explained that, "[e]ven in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 38 Fed. Reg. 17,979 (1973). Thus, the Department noted, "an applicant or recipient may properly

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[6] In 1970, Congress ratified the Department of Education's 1968 Title VI Guidelines when it provided that "[i]t is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 * * * dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States." Congress further specified that "[s]uch uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found." Pub. L. No. 91-230, § 2, 84 Stat. 121 (1970) (codified as amended at 42 U.S.C. § 2000d-6); *see also* Pub. L. No. 92-318, § 703(b), tit. VII, 86 Stat. 422 (1972) (also articulating policy of uniform nationwide application of Title VI to *de facto* and *de jure* segregation by race).

give special consideration to race, color, or national origin." *Id.* at 17,981.

When the United States filed its brief as *amicus curiae* in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the Solicitor General correctly stated that the Department had interpreted Title VI "as permitting consideration of race in the university admissions process." Supp. Br. for the United States as *Amicus Curiae*, in No. 76-811, at 18 (Nov. 1977). Furthermore, the Solicitor General contended, consistent with the views of the Department, that the "elimination of racial separation is an important governmental objective." *Id.* at 14 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1970); *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 94-95 (1977)).

Following this Court's *Bakke* decision, the Department reexamined its Title VI regulations and concluded that no changes were warranted. *See* 44 Fed. Reg. 58,509 (1979). The Department determined that the Title VI regulatory provision that authorized voluntary consideration of race is consistent with the Court's decision and that *Bakke* permits schools to "establish and pursue numerical goals to achieve the racial and ethnic composition of the student body it seeks." *Id.* at 58,511. These regulations are still in effect and have not been altered over the course of the past 30 years. *See* 34 C.F.R. §§ 100.3(b)(6)(ii), 100.5(i).

* * *

The federal government's longstanding policy of promoting diversity in the nation's elementary and secondary schools thus reflects nearly five decades of careful and deliberate consideration of the negative effects on children of racial isolation. Far from embodying a fleeting administration-specific viewpoint, the Department has

consistently concluded that the voluntary desegregation and diversification of segregated school districts contributes to the well-being of the Nation, after witnessing and studying the effects on children of such segregation, regardless of its cause. The Department realized that addressing only segregation that could be proven to be caused by unconstitutional discrimination would leave large swaths of our Nation's schools composed of racially isolated children. Accordingly, the Department concluded that children of all races, and society as a whole, would benefit from more diverse learning environments in which students could gain a common understanding of each other and the larger community in which they live.

II. The Longstanding Federal Policy Of Deference To Local School Districts Supports According Those Districts Latitude In Crafting Programs Aimed At The Elimination, Reduction, And Prevention Of Racial Isolation In Public Schools

The Department has taken a deferential approach over the past several decades to local school districts' attempts to diversify racially isolated schools. The Department has provided information, expertise, and experience to States and localities so that they can craft their own programs to address individual local circumstances. Underlying this respect for the voluntary efforts of school districts to desegregate their schools is the overriding federal policy that education is a local matter that cannot, and should not, be governed by a singular federal policy.

Indeed, when Congress established the Department of Education in 1979, it expressly found that, "in our Federal

system, the primary public responsibility for education is reserved respectively to the States and the local school systems." Department of Education Organization Act, Pub. L. No. 96-88, tit. I, § 101, 93 Stat. 669 (1979). Congress established the Department of Education, in part, "to protect the rights of State and local government * * * in the areas of educational policies and administration of programs." *Id.* § 103(a), 93 Stat. 670. Furthermore, every program administered by the Department of Education is a condition on the receipt of federal education funds and does not constitute a unilateral federal regulatory scheme.[7]

Congress has on many occasions expressed the view that the federal government should not require any particular response from local school districts to racial segregation in public schools that cannot be proven to be the result of *de jure* segregation. At the same time, Congress has indicated that the federal government should support local school districts if the districts themselves elect to combat "racial imbalance." *See, e.g.*, Pub. L. No. 92-318, tit. VIII, § 802(a), 86 Stat. 442 (1972) ("No funds appropriated * * * may be used for the

[7] In doing so, Congress followed a pattern established earlier in the Nation's history. *See, e.g.*, Act of July 2, 1862, ch.130, 12 Stat. 503 (First Morrill Act, also known as the Land Grant College Act) (offering federal land to States on condition they sell the land and put the money in a fund which would be appropriated "to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life").

transportation of students or teachers * * * in order to overcome racial imbalance in school or school system * * * except on the express written voluntary request of appropriate local school officials.").[8]

This mandate is consistent with this Court's treatment of educational issues, which has continually stressed that education always has been a matter in which localities are authorized to shape their own policies. *See Milliken v. Bradley*, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools."); *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (States should not be prevented "from experimenting and exercising their own judgment in an area [such as education] to which States lay claim by right of history and expertise"). School districts are entitled to great deference even when they have engaged in constitutional violations. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *Brown v. Board of Education*, 349 U.S. 294, 299 (1955).

Because federal law acknowledges that States and localities have the primary responsibility for educating

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[8] Other statutes also make clear that the federal government would not require school districts to address the racial composition in their schools absent prior *de jure* segregation *See* Pub. L. No. 88-352, tit. IV, § 407, 78 Stat. 248 (codified at 42 U.S.C. § 2000c-6(a)). The Eagleton-Biden Amendment, which has been attached to every appropriations act for the Department since 1977, provides that none of the appropriated funds "shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home * * * in order to comply with Title VI of the Civil Rights Action of 1964. * * * The prohibition in this section does not include the establishment of magnet schools." *E.g.*, Pub. L. No. 109-149, § 302, 119 Stat. 2870 (2006).

children and precludes federal interference with decisions in most instances, some latitude must be accorded to local school districts that have determined, often with the assistance of the Department's expertise, that race is an appropriately tailored means to achieve the compelling national interest in the elimination, reduction, and prevention of racial isolation and promotion of racially integrated schools with diverse student bodies. Granting school authorities this latitude will provide them some needed breathing space so that they feel confident to make sound educational choices for their students in the "play between the joints" of what the Constitution requires and what the Constitution prohibits. *Cf. Locke v. Davey*, 540 U.S. 712, 718 (2004).

CONCLUSION

For the reasons set forth above, the judgments of the courts of appeals should be affirmed.

Respectfully submitted,

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OCTOBER 10, 2006